ORIGINAL

Supreme Court, U.S.
FILED
MAY 4 1998
CLERK

No. 97-1650

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

RON CHAMPION and
ATTORNEY GENERAL OF OKLAHOMA,
Petitioners,

v.

DAVID LEE SACK,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

COME NOW the Respondent, David Lee Sack, and respectfully MOVES pursuant this Honorable Court's Rule 15 in opposition of Petitioner's Petition for Writ of Certiorari to the U.S. Court of Appeals for the Tenth Circuit.

STATEMENT OF THE CASE

Petitioners are attempting to use Respondent as a scapegoat for past failures to timely petition this Court and misleading this Court in regard to Tenth Circuit's federal ruling and Oklahoma's state holding, their inapplicability to Respondent and completely disregarding this Court's precedence and the doctrines of res judicata, collateral estoppel and law of the case.

FACTUAL LEGAL BACKGROUND

On May 19, 1993, the Honorable panel of Tenth Circuit Judges, Tacha, Baldock, and Kelly, remanded to the U.S. District Court for Western Oklahoma "to determine whether Oklahoma's procedural rule requiring ineffective assistance of counsel claims to be brought on direct appeal is an adequate state ground;" see Thompson v Champion, 93-6035, at WL170294, slip op 6-7.

The district court thereafter in case number CIV-92-1970-T did thoroughly examine numerous Oklahoma Court of Criminal Appeals' decisions in finding such state ground was evolving and thereby rendering state procedural rule (bar) inadequate, allowing federal courts to review ineffective assistance of counsel claims in

5 pp

habeas corpus proceedings. (D.Ct.J. adopting R&R on 9/13/93).

On October 14, 1994, the Honorable panel of Tenth Circuit Judges, Baldock, Brorby, and Ebel rendered the published opinion of Brecheen v Reynolds, 41 F3d 1343 (10 Cir 1994).

On October 19, 1994, the Honorable panel of Tenth Circuit Judges, Tacha and Ebel with Honorable District Court Judges Rogers, entered Order and Judgment in Respondent's case entitled Sack v Champion, 94-7018, 38 F3d 1220 (table) text available at WL577526 (10 Cir 1994). See also at Petitioner's Appendix 58-A through 70-A. Doctrines of res judicata, collateral estoppel, and law of the case applied pursuant Tenth Circuit Rule 36.3. (Pet.'s App. 70).

On October 20, 1994, the Honorable panel of Tenth Circuit Judges, Tacha, Ebel and Brorby, affirmed the U.S. District Court for Western Oklahoma case of Thompson v Champion in Tenth Circuit case number 93-6325. Pursuant to Tenth Circuit's Rule 36.3, doctrines of res judicata, collateral estoppel and law of the case apply, rendering Thompson as persuasive and binding authority. 151 F.R.D. 470 (11/29/93).

ARGUMENT AND AUTHORITIES

I.

The Tenth Circuit's action in 1993 in Thompson, 93-6035, ordering the district court to examine the adequacy of Oklahoma's procedural rule and the Tenth Circuit's 1994 action in Brecheen, Sack, and Thompson, supra with basically the same nucleus of Honorable Judges establish beyond cavil that the 1994 remand of Respondent's case, 94-7018, WL577526, (Pet. App. 58-70) was not as the Petitioner misrepresents to this Court at page 7 of petition that the Tenth Circuit's 1994 remand of Sack was for the district court to determine "if Oklahoma bars collateral review of ineffective assistance claims...that realistically could not have been raised on direct appeal...". To the contrary, the Tenth Circuit's 1993 question had been manifold in 1994, and Sack 94-7018 was for the district court to "reach petitioner's ineffective assistance of trial counsel claims." Thereafter citing Hill v Lockhart

this Court's standard for examining attorney performance in guilty plea context like Respondents'. See Sack, 94-7018; WL577526 slip op at 8; Pet. App. 70. There exist no reference, reliance or citation to Brecheen in Sack 1994 remand. (Pet. App. 58-70).

II.

The petitioner in Thompson, supra, is a 1989 guilty plea case, see Thompson, 93-6035 and WL170294, slip op at 1. Thus, the district court's inadequacy finding and Tenth Circuit's affirmation thereof in Thompson, 93-6325, supra, necessarily finds and binds Respondent's 1990 (Pet. App. 59) procedural error inadequate to preclude federal review. (Pet. App. 69-70) Independency and adequacy of state procedural default rule is analyzed at date such default occurs. Fields v Calderon, 125 F3d 757 (9 Cir 1997) citing Ford v Georgia, 498 U.S. 411, 424-25 (1991) and James v Kentucky, 466 U.S. 341,348-51 (1984). Petitioner's reliance upon a 1995 case of Berget v State, 907 P2d 1078 (OK Cr) finds no applicability to Respondent pursuant this Court's holding above. Additionally, Berget is not ripe enough to even satisfy James' first prong of "firmly established". Id.

III.

Because Respondent's habeas petition was filed in 1992, the Tenth Circuit granted a certificate of probable cause in Sack, 97-7017. Respondent did not cite, rely or implicate Brecheen in any fashion. Respondent relied entirely on Sack, 94-7018, Thompson, 93-6325, and the doctrines of law of the case, res judicata and collateral estoppel.

Just as the Petitioners and district court ignored such stare decisis, so too did the Tenth Circuit.

CONCLUSION

Neither the federal case of Brecheen or the state case of Berget are applicable and the Petitioners, district court and the Tenth Circuit have denied Respondent due process and equal protection of the law. Respondent Prays Petition for Writ

of Certiorari be denied.

Respectfully submitted,

David Sack

David Lee Sack

CERTIFICATE OF MAILING

I certify on this 1st day of May, 1998, Brief in Opposition was placed in U.S. Mail addressed to Patrick Crawley at 112 State Capital Bldg., Oklahoma City, Oklahoma 73105, last known address.

David Sack

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

May 11, 1998

AREA CODE 202
479-3011

David Sack
#100684
P.O. Box 200
Hinton, OK 73047

RE: Ron Champion, Warden, et al. v. David L. Sack

Dear Mr. Sack:

This office received on May 4, 1998, your brief in opposition to the above-entitled petition for a writ of certiorari.

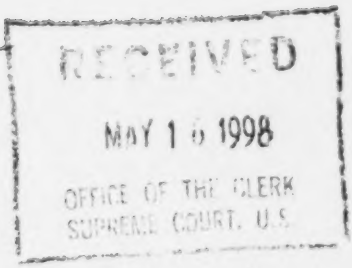
Before it may be filed and bought to the attention of the Court, you must submit a motion for leave to proceed in forma pauperis and affidavit as required by Rule 39 of the enclosed Rules of the Supreme Court. Enclosed is a motion that you may complete and return to this office by return mail.

Enclosed is a copy of your response.

Sincerely,
William K. Suter, Clerk
By: Marcus Cate

Francis J. Lorson
(202) 479-3024

Completed And
Returned by
Respondent
David L. Sack



Enclosures